STATE OF MICHIGAN

COURT OF APPEALS

PAUL HOLLIS, Personal Representative of the Estate of DOROTHY M. DAVIS,

Plaintiff-Appellant,

v

TROTT & TROTT, P.C., and MANUFACTURERS & TRADERS TRUST COMPANY,

Defendants-Appellees.

UNPUBLISHED
June 17, 2010

No. 289613
Wayne Circuit Court
LC No. 06-629516-CZ

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Plaintiff Paul Hollis, personal representative of the estate of Dorothy M. Davis, appeals as of right the trial court's order denying his postjudgment motion for an award of attorney fees against defendant Manufacturers & Traders Trust Company ("M & T"). We affirm.[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that he is entitled to attorney fees as a sanction for M & T's assertion of a frivolous defense. "We review for clear error the trial court's determination whether to impose sanctions under MCR 2.114." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). We also review for clear error a trial court's determination whether attorney fees should

[1] The trial court dismissed plaintiff's claims against Trott & Trott, P.C., with prejudice. In this appeal, plaintiff challenges the trial court's denial of his motion for attorney fees with respect to defendant M & T only. We note that M & T argues that this Court should dismiss plaintiff's appeal for lack of jurisdiction because he failed to brief the only issue properly before this Court, i.e., whether the trial court erred in denying his postjudgment motion for attorney fees, and because he failed to provide a copy of the transcript of the November 21, 2008, hearing on his motion for attorney fees and costs. Plaintiff complied with MCR 7.210(B)(1)(a) by filing the transcript of the November 21, 2008, hearing, and in his brief on appeal, he argues the merits of his claim that the trial court erred by denying his postjudgment motion for attorney fees. Thus, there is no merit to M & T's jurisdictional argument.

be awarded based on the assertion of a frivolous defense under MCL 600.2591. *Phinisee v Rogers*, 229 Mich App 547, 561; 582 NW2d 852 (1998). A decision is clearly erroneous when, although there may exist evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Guerrero*, 280 Mich App at 677.[2]

"Under the American Rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). Under MCR 2.114(F), "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)[,]" which states that if a court finds an action or defense frivolous, sanctions "*shall* be awarded as provided by MCL 600.2591" (emphasis added).

MCL 600.2591(3)(a) provides:

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

Plaintiff contends that M & T had no reasonable basis to believe the facts underlying its legal position were true and that its legal argument was devoid of arguable legal merit. Plaintiff concedes that the trial court dismissed his Michigan Consumer Protection Act and slander of title claims. Thus, at issue was whether M & T violated MCL 600.3204, which, at the time relevant to this action, provided in pertinent part:

> (1) A party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> * * *
>
> (c) The mortgage containing the power of sale has been properly recorded.

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[2] M & T cites *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997), as support for its contention that the trial court's decision is reviewed for an abuse of discretion. However, that case did not involve a decision whether a claim or defense was frivolous, which requires a factual finding.

In accordance with this statute, the trial court recognized that the only issues presented were whether to "void the foreclosure sale" and the amount of damages, if any, related thereto. We note that although plaintiff claimed M & T violated MCL 600.3204, he did not seek to void the foreclosure sale in either his complaint or amended complaint.

In response to the trial court's pronouncement of the issues involved in this case, M & T argued that the assignment from Contimortgage Corporation ("Conti") to M & T was unenforceable and that the actions of both Conti and M & T following the assignment demonstrated that they either waived or rescinded the assignment. M & T relied on the fact that both it and Conti disregarded the assignment, Conti's foreclosure on the property was inconsistent with the assignment, M & T did not object to the foreclosure proceedings despite its purported interest in the property, the assignment was unrecorded, and Conti quit-claimed its interest in the property to M & T after the foreclosure and sheriff's sale, tending to show that M & T did not possess such an interest previously. M & T also argued that the doctrine of laches barred plaintiff's claim. M & T supported its arguments with appropriate legal authority. We cannot conclude that M & T's arguments were devoid of arguable legal merit or factually baseless. If the trial court had agreed with M & T that the actions of M & T and Conti demonstrated that the assignment had been rescinded, there would have been no violation of MCL 600.3204 and no basis to void the foreclosure. Although M & T's arguments were ultimately unsuccessful, that did not render M & T's defense frivolous. *Kitchen*, 465 Mich at 662.

At the May 30, 2008, evidentiary hearing, the trial court stated that, based on the record, it could not conclude that M & T's defense was frivolous. Although the court referred to the dictionary definition of the word "frivolous" rather than the meaning of the term as articulated in MCL 600.2591(3)(a), its reasoning and its statement that the case was complex demonstrate that M & T's defense and arguments were not frivolous within the meaning of the statute. The trial court's determination was not clearly erroneous.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering